

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TIMOTHY KORNEGAY,

Plaintiff,

vs.

D. BAILEY, et al.,

Defendants.

CASE NO. 12-CV-1616 JLS (MDD)

**ORDER (1) ADOPTING REPORT
AND RECOMMENDATION; (2)
OVERRULING PLAINTIFF'S
OBJECTIONS; AND (3)
GRANTING DEFENDANTS'
MOTION TO DISMISS**

(ECF No. 14)

Presently before the Court is Magistrate Judge Dembin's Report and Recommendation ("R&R") advising the Court to **ADOPT** the R&R and **GRANT** Defendants D. Bailey, A. Pope, and D. Savage's ("Defendants") Motion to Dismiss ("MTD") Plaintiff Timothy Kornegay's ("Plaintiff") Complaint. (ECF No. 14.) Also before the Court are Plaintiff's Objections to the R&R (ECF No. 20) and Defendants' Reply to Plaintiff's Objections (ECF No. 22). Having considered the parties' arguments and the law, the Court **ADOPTS** the R&R, **OVERRULES** Plaintiff's Objections, and **GRANTS WITHOUT PREJUDICE** Defendants' MTD.

BACKGROUND

Magistrate Judge Dembin's R&R provides a thorough and accurate summary of the factual and procedural background in this case. (R&R 2-3, ECF No. 14.) This Order incorporates by reference the facts as set forth in the R&R.

LEGAL STANDARD

1. Review of the Report and Recommendation

Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district court's duties regarding a magistrate judge's R&R. The district court "shall make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). However, in the absence of a timely objection, "the Court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72, advisory committee's note (citing *Campbell v. U.S. Dist. Ct.*, 501 F.2d 196, 206 (9th Cir. 1974)).

2. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint "fail[s] to state a claim upon which relief can be granted," generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although Rule 8 "does not require 'detailed factual allegations,' . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*

1 (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is
 2 facially plausible when the facts pled “allow[] the court to draw the reasonable
 3 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*,
 4 550 U.S. at 556). That is not to say that the claim must be probable, but there must be
 5 “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Facts
 6 “‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to
 7 relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as
 8 true “legal conclusions.” *Id.* at 678–79. This review requires context-specific analysis
 9 involving the Court’s “judicial experience and common sense.” *Id.* at 679 (citation
 10 omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the
 11 mere possibility of misconduct, the complaint has alleged—but it has not
 12 ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

13 When a plaintiff appears pro se, the Court construes the pleadings liberally and
 14 affords the plaintiff any benefit of the doubt. *See Erickson v. Pardus*, 551 U.S. 89, 94
 15 (2007); *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). When giving liberal
 16 construction to a pro se complaint, however, the Court is not permitted to “supply
 17 essential elements of the claim that were not initially pled.” *Easter v. CDC*, 694 F.
 18 Supp. 2d 1177, 1183 (S.D. Cal. 2010) (quoting *Ivey v. Bd. of Regents of the Univ. of*
 19 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). “Vague and conclusory allegations of
 20 official participation in civil rights violations are not sufficient to withstand a motion
 21 to dismiss.” *Id.* (quoting *Ivey*, 673 F.2d at 268). The Court should allow a pro se
 22 plaintiff leave to amend “unless the pleading could not possibly be cured.” *Ramirez v.*
 23 *Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (internal citations omitted).

24 ANALYSIS

25 1. Summary of R&R’s Conclusions

26 Regarding Plaintiff’s Fourteenth Amendment claim, Magistrate Judge Dembin
 27 found that Plaintiff failed to plead a substantive due process claim because Plaintiff
 28 failed to plead a cognizable deprivation of an established liberty interest. (R&R 6, ECF

1 No. 14.) While Petitioner claimed a liberty interest in his “Medium A” custody status
2 and in his family visitation rights, the law does not recognize either of these as rights.
3 (*Id.* at 6–7.) The magistrate judge also determined that Plaintiff failed to plead a
4 procedural due process claim because Plaintiff admitted that he was given notice and
5 a hearing before his custody status was changed, and Plaintiff did not contradict
6 Defendants’ allegations that Plaintiff was given the opportunity to be heard. (*Id.* at 7.)

7 Regarding Plaintiff’s First Amendment claim, the magistrate judge found that,
8 because Defendants did not contradict Plaintiff’s claims that his chrono update was only
9 supposed to determine whether he had remained free from disciplinary action,
10 Defendants took adverse action against Plaintiff for repeatedly asking Defendant Bailey
11 to update Plaintiff’s family visit forms. (*Id.* at 9–10.) However, Plaintiff neither
12 alleged any cognizable chilling effect or “more than minimal” harm nor explained how
13 his status change failed to reasonably advance a legitimate correctional goal. (*Id.* at
14 10–12.) Thus, Plaintiff failed to plead a valid First Amendment retaliation claim. (*Id.*
15 at 12.) The magistrate judge also found that Plaintiff’s conspiracy claim failed because
16 Plaintiff failed to allege any actual deprivation of a constitutional right, and that
17 Defendants are protected by absolute immunity in their official capacities. (*Id.* at
18 12–13.) Accordingly, Magistrate Judge Dembin urged this Court to dismiss Plaintiff’s
19 Complaint. (*Id.* at 14.)

20 **2. Objections to the R&R’s Conclusions**

21 Regarding his Fourteenth Amendment claim, Plaintiff asserts that Defendants
22 violated his substantive due process rights because he has a liberty or property interest
23 in his “Medium A” custody status because “he earned it by programming and staying
24 discipline free,” and that he has the right to retain this status unless disciplinary action
25 is taken against him. (Objs. to R&R 7–8, ECF No. 20.) He also asserts a liberty interest
26 in family visitation, and objects that the magistrate judge “failed to construe Plaintiff’s
27 complaint to [*sic*] Defendants retaliated against Plaintiff.” (*Id.* at 8.) Plaintiff objects
28 to the R&R’s procedural due process analysis “on the grounds that he is a pro se

litigant.” (*Id.*)

Regarding the fourth element of his First Amendment retaliation claim, Plaintiff argues “that he was chilled, in giving defendants ‘fair notice,’” and that he “need only show that the adverse action at issue ‘would chill or silence a prison [*sic*] of ordinary firmness from future First Amendment activities.” (*Id.* at 12–13.) As to element five, Plaintiff says that the R&R “failed to note that Plaintiff only have [*sic*] about 2 Years before he [*sic*] parole.” (*Id.* at 13.)

3. Reply to the Objections

Regarding substantive due process, Defendants argue that Plaintiff fails to address the R&R’s determination that Plaintiff lacks a cognizable liberty interest. (Reply to Objs. 2, ECF No. 22.) Plaintiff only argues that he *should* have a liberty interest, and he fails to cite authority for this proposition. (*Id.*) As to procedural due process, Defendants claim that Plaintiff likewise fails to contradict the R&R’s finding that Plaintiff alleged no procedural deficiencies, and instead Plaintiff only offers conclusory legal statements. (*Id.* at 2–3.) With regards to Plaintiff’s retaliation claim, Defendants argue that Plaintiff alleges no facts showing that he was chilled, but instead asserts only a legal conclusion. (*Id.* at 3–4.) Further, Plaintiff does not show any flaw in the R&R’s analysis of the fifth element, and instead “simply argue[s] that a different standard should have been applied to him.” (*Id.* at 4.)

4. Analysis

Because Plaintiff only objects to the R&R’s analysis of his Fourteenth and First Amendment claims, and because the R&R’s analysis of Plaintiff’s conspiracy claim is thorough, well reasoned, and contains no clear error, the Court **ADOPTS** that portion of the magistrate judge’s R&R in its entirety.

A. Fourteenth Amendment Substantive Due Process Claim

To properly plead a substantive due process claim, a plaintiff must allege a constitutionally protected liberty or property interest of which he may not be deprived, “regardless of the fairness of the procedures used.” *Daniels v. Williams*, 474 U.S. 327,

331 (1986) (citations omitted). The Supreme Court has “rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right.” *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976). Rather, in order to establish that an action violates his substantive due process rights, a prisoner must allege conditions that “‘impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.’” *Stevens v. Robles*, No. 06CV2072-LAB (LSP), 2008 WL 667407, at *4 (Mar. 7, 2008) (quoting *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995)).

Plaintiff argues that Defendants violated his substantive due process rights because Plaintiff has a constitutionally protected interest in his “Medium A” custody status and his family visitation rights. (Objs. to R&R 7–8, ECF No. 20.) However, “California has not created liberty interests enforceable by prisoners in either classification or in visitation.” *Stevens*, 2008 WL 667407, at *6 (citations omitted). The Ninth Circuit and the Southern District have repeatedly held that prisoners have no liberty interest in a particular classification status. *See, e.g., Hernandez v. Johnson*, 833 F.2d 1316, 1318 (9th Cir. 1987); *Parra v. Hernandez*, No. 08-CV-0191 H(CAB), 2009 WL 799065, at *7 (S.D. Cal. Mar. 24, 2009); *Adams v. Small*, No. 10cv1211-MMA (POR), 2012 WL 296065, at *3 (S.D. Cal. Jan. 31, 2012) (citations omitted); *Stevens*, 2008 WL 667407, at *7 (citations omitted). Further, California prison regulations deem visitation a privilege, not a right. *Stevens*, 2008 WL 667407, at *6 (citation omitted). Plaintiff also does not allege any facts showing that the change in his classification status or the deprivation of his family visitation rights affect him in any atypical way or to a greater degree than the average inmate. Plaintiff, therefore, fails to establish that he has a cognizable liberty or property interest in his classification status or his visitation rights. Accordingly, the Court **ADOPTS** the R&R’s determination that Plaintiff’s substantive due process claim must be **DISMISSED**.

B. Fourteenth Amendment Procedural Due Process Claim

Procedural due process requires notice and an opportunity to be heard prior to the

1 deprivation of a constitutionally protected liberty or property interest. *Logan v.*
 2 *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). However, this Court has found that
 3 Plaintiff lacked a cognizable interest in either his classification status or his visitation
 4 rights. Moreover, Plaintiff admits that he received notice of the reclassification
 5 procedure and that a hearing was conducted before his custody status was changed.
 6 (Compl. 4A, ECF No. 1.) Nonetheless, Plaintiff objects to the R&R's procedural due
 7 process analysis because he is a pro se litigant, and the Court must construe his
 8 Complaint liberally and give him any benefit of the doubt. (Objs. to R&R 8–9, ECF
 9 No. 20.) Yet, no matter how liberally the Court construes Plaintiff's Complaint, it
 10 cannot give Plaintiff a right where none exists. Accordingly, the Court **ADOPTS** the
 11 R&R's conclusion that Plaintiff's procedural due process claim must be **DISMISSED**.

12 **C. First Amendment Retaliation Claim**

13 A First Amendment retaliation claim requires the prisoner to assert:

14 (1) that a state actor took some adverse action against an inmate (2)
 15 because of (3) that prisoner's protected conduct, and that such action (4)
 16 chilled the inmate's exercise of his First Amendment rights, and (5) the
 action did not reasonably advance a legitimate correctional goal.

17 *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). Construing the Complaint
 18 in the light most favorable to Plaintiff, the magistrate judge found that Plaintiff
 19 sufficiently pleaded the first three elements. (R&R 9–10, ECF No. 14.) Thus, only the
 20 fourth and fifth elements are before this Court.

21 *i. Fourth Element: Chilling*

22 Plaintiff points to pages 3A and 4A of his Complaint as containing the relevant
 23 allegations of chilling. (Objs. to R&R 12–13, ECF No. 20.) On page 3A, Plaintiff
 24 states that he was “chilled due to defendants D. Bailey, A. Pope and D. Savage
 25 retaliatory conduct [*sic*] by making plaintiff now ineligible for participation in the
 26 family visiting.” On page 4A, Plaintiff alleges that he “has been chilled due to these
 27 defendants retaliatory conduct [*sic*] in making plaintiff now ineligible for participation
 28 in the family visiting.”

Plaintiff, however, appears to misunderstand the meaning of the term “chilling.”

1 Plaintiff seemingly equates “chilling” with more generalized harm—here, the loss of
 2 his family visitation rights. In the First Amendment context, however, Plaintiff needs
 3 to allege that Defendants’ conduct would deter a person of ordinary firmness from
 4 engaging in further constitutionally protected speech. *See Sloman v. Tadlock*, 21 F.3d
 5 1462, 1469 (9th Cir. 1994) (citation omitted). Yet, Plaintiff does not allege that
 6 Defendants’ conduct would prevent the ordinary prisoner from requesting prison
 7 officials’ action or from challenging the actions of prison officials. Rather, while
 8 Plaintiff addresses other ways in which Defendants harmed him, Plaintiff’s Complaint
 9 is silent as to the effect of Defendants’ actions on free speech. Plaintiff also fails to
 10 allege a “harm that is more than minimal” because Plaintiff fails to allege any legally
 11 cognizable injury as, for the reasons provided above, Plaintiff has no entitlement to a
 12 given custody status or to family visitation rights. Accordingly, Plaintiff fails to
 13 establish the fourth *Rhodes* element.

14 *ii. Fifth Element: Legitimate Penological Goal*

15 Plaintiff seemingly argues that because Defendants previously found his “Medium
 16 A” status to be appropriate and because he only had two years left in his sentence, the
 17 change in status at this point in his incarceration did not reasonably advance a legitimate
 18 correctional goal. (Objs. to R&R 13, ECF No. 20.) Defendants, however, purportedly
 19 decided to change Plaintiff’s custody status on the basis of California Code Regulations,
 20 title 15, § 3377.2(c)(2)(D). At the time of the filing of the Complaint and the happening
 21 of the actions alleged therein, this regulation provided that an inmate sentenced to a term
 22 of fifteen to fifty years who had an escape history “shall be assigned to no less restrictive
 23 custody than Close B Custody,” without the possibility of a reduction of custody. (Mot.
 24 to Dismiss Ex. A, ECF No. 6-1.) According to Plaintiff’s official prison records, his
 25 sentence at the time was twenty-seven years and eight months. (*Id.*) Plaintiff also had
 26 been convicted for an escape from jail with force. (*Id.*) Accordingly, per the plain terms
 27 of the regulation, Defendants lacked the discretion to assign Plaintiff to a less restrictive
 28 custody status than “Close B.”

1 Further, upon changing Plaintiff's custody status, Defendants stated their belief
 2 that allowing Plaintiff to retain his "Medium A" custody "would jeopardize the safety
 3 and security of the institution as well as staff." (*Id.*) "[P]rison security is a legitimate
 4 penological purpose." *Sims v. Veal*, No. CIV S-07-0890, MCE EFB P, 2009 WL
 5 2868718, at *10 (E.D. Cal. Sept. 2, 2009) (citing *Rizzo v. Dawson*, 65 F.3d 802, 807 (9th
 6 Cir. 1995)). Thus, altering Plaintiff's custody status (and consequently revoking his
 7 family visitation privileges) reasonably advanced a legitimate correctional goal.
 8 Plaintiff, therefore, fails to establish the fifth *Rhodes* element. Accordingly, the Court
 9 **ADOPTS** the R&R's determination that Plaintiff's First Amendment retaliation claim
 10 must be **DISMISSED**.

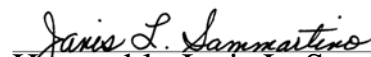
11 **CONCLUSION**

12 For the reasons stated above, the Court: (1) **ADOPTS** the R&R in its entirety; (2)
 13 **OVERRULES** Plaintiff's Objections; and (3) **GRANTS** Defendants' MTD.

14 Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**. Plaintiff is
 15 **GRANTED** forty-five (45) days' leave from the date this Order is electronically
 16 docketed in which to file an Amended Complaint that cures all of the deficiencies of
 17 pleading noted above. Plaintiff's Amended Complaint must be complete in itself
 18 without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants
 19 not named and all claims not re-alleged in the Amended Complaint will be considered
 20 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's
 21 Amended Complaint fails to state a claim upon which relief may be granted, it may be
 22 dismissed without further leave to amend.

23 **IT IS SO ORDERED.**

24 DATED: December 2, 2013

25 
 26 Honorable Janis L. Sammartino
 27 United States District Judge
 28